No. 80-576

DEC 12
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LACLEDE GAS COMPANY, *Appellant,*

v.

PUBLIC SERVICE COMMISSION OF MISSOURI, *Appellee.*

On Appeal From The Supreme Court Of Missouri

MOTION TO DISMISS OR AFFIRM

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On Appeal From The Supreme Court Of Missouri

MOTION TO DISMISS OR AFFIRM

The Appellee Missouri Public Service Commission respectfully moves pursuant to Rule 16(1)(b), (c) and (d) to dismiss the appeal or to affirm the order of the Supreme Court of Missouri entered below.

NATURE OF THE CASE

The Missouri Public Service Commission (Commission) is an administrtive agency of the State of Missouri with jurisdiction to, among other things, regulate rates and services of natural gas distribution companies such as Laclede Gas Company (Laclede) (Mo. Rev. Stat.

§393.130, 393.140, 393.150, 393.270 (1978); §393.250 (Supp. 1980)). The facts, statutes and constitutional provisions involved in this case are described in Laclede's jurisdictional statement, and need not be repeated here. However, the Commission does dispute Laclede's argument (Jurisdictional Statement, pages 3-4) regarding the mootness of this appeal; the Commission's position on the issue of mootness is set forth in Part I below.

I. Laclede's Appeal Is Moot

The Supreme Court noted in *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) the familiar proposition that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. The Court said that the inability of the federal judiciary to review moot cases derives from the requirement of Article III of the Constitution under which judicial power depends upon the existence of a case or controversy.

The Supreme Court should dismiss Laclede's appeal because any decision on the merits would have no effect on the l..igants either prospectively or retroactively.

In its Jurisdictional Statement (page 13) Laclede argues that the Commission's advertising guidelines for ratemaking purposes in the challenged Missouri Commission order of April 21, 1978 (*Re Laclede Gas Company*, Mo.P.S.C. Case No. GR-77-33, 25 P.U.R. 4th 51 (1978); Separate Appendix to Jurisdictional Statement, pages A-34 to A-106) are illusory. Laclede argues that the guidelines should be ruled invalid because they are vague. But Laclede is here attacking a straw man because the Missouri Commission no longer applies the guidelines set forth in the challenged order. The old guidelines of the challenged order (Missouri Commission

Case No.GR-77-33) were abandoned in *Re Laclede Gas Company*, Mo.P.S.C. Case No. GR-78-148, 27 P.U.R. 4th 241, 250 (1978) where the Commission stated:

> . . . the policy adopted in both Re Kansas City Power and Light Case No. 18,433, and GR-77-33 will no ionger be in effect for future advertising programs of Laclede Gas. The Commission adopts the New York [Public Service Commission] policy which will permit informational, institutional and goodwill advertising in an amount which is based on a percentage of operating revenues for utility companies.

In all subsequent cases in which the issue of advertising has been contested the Missouri Commission has adopted the new policy which was first enunciated in the 1978 decision quoted above. *Cf. Re Kansas City Power & Light Company,* Mo.P.S.C. Case No. ER-78-252, 28 P.U.R. 4th 398, 437 (1979); *Re Empire District Electric Company,* Mo.P.S.C. Case No. ER-79-19, 30 P.U.R. 4th 1, 4 (1979); *Re Southwestern Bell Telephone Company,* Mo.P.S.C. Case Nos. TR-77-214 and TR-79-213 (1980) (unpublished). Therefore a decision regarding the old guidelines will have no effect on the Commission's current policy.

Laclede's argument against mootness (Jurisdictional Statement, pages 3-4, n.2) rests on the assumption that the Commission will apply the old guidelines to Laclede in the future. Laclede's assumption is incorrect, as explained in the paragraph above.

The Supreme Court has held in a number of cases that, during the pendency of an appeal, a change in the challenged statute or administrative rule can render the appeal moot. Laclede noted in its jurisdictional statement (page 4) that for jurisdictional purposes the action of the Missouri Commission is the equivalent of a

Missouri statute. More specifically, concerning the issue of mootness, in *Hall* v. *Beals*, 396 U.S. 45 (1969) the appellants challenged on constitutional grounds the six-month residency requirement which a Colorado statute imposed for eligibility to vote in a presidential election. During the pendency of this suit the Colorado Legislature amended the statutory residency requirement for voting in a presidential election to two months. The Supreme Court held that the legislature's amendment of the statute rendered the appeal moot:

> . . . We review the judgment below in light of the Colorado statute as it now stands, not as it once did. [citations omitted] And under the statute as currently written, the appellants could have voted in a 1968 Presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law [citations omitted]. (398 U.S. at 48).

Accord, Diffenderfer v. *Central Baptist Church*, 404 U.S. 412 (1972); *cf. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 331 (1961); *Ralf* v. *Weinberger*, 565 F.2d 722, 727 (D.C. Cir. 1977).

Additionally, the Supreme Court's decision of the merits of this case would have no retrospective effect on Laclede's rates. The Missouri Commission has granted Laclede new rate increases in Commission Case No. GR-78-148 *supra*, which became effective December 1, 1978 and in *Re Laclede Gas Company*, Mo.P.S.C. Case No. GR-80-210 (1980) (unpublished) which became effective October 10, 1980. Since there was no stay of the Commission's challenged order in this appeal, and since subsequent rate increases have become effective, even a victory on the merits by Laclede in this appeal would have no retrospective effect on Laclede's rates. This is so

because under Missouri law courts may neither fix rates retroactively nor compel the Missouri Commission to engage in retroactive ratemaking. *Lightfoot* v. *City of Springfield*, 236 S.W.2d 348 (Mo. 1951); *State ex rel. Capital City Water Company* v. *Public Service Commission*, 298 Mo. 524, 252 S.W. 446 (banc 1923). *See State ex rel. Utility Consumers Council* v. *Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979) citing *Board of Public Utility Commissioners* v. *New York Telephone Company*, 271 U.S. 23, 31 (1926).

In *Market Street Railroad Co.* v. *Railroad Commission*, 324 U.S. 548 (1945), *rehearing denied*, 324 U.S. 890 (1945) the railroad appealed from a decision of the California Supreme Court affirming a decision of the Railroad Commission of California which reduced passenger fares from seven cents to six cents. The railroad had obtained a stay of the California Commission's order which impounded the disputed one cent per passenger pending settlement of the issues. During the pendency of the appeal the railroad company sold its properties. The Supreme Court said:

> The case is saved from being moot only because its decision is necessary to determine whether the company is entitled to its impounded portion of the fares or whether the money should be refunded to passengers making claims and unclaimed amounts thereof be paid over to the state, as required by conditions of the stay order. (324 U.S. 553)

Thus the Supreme Court indicated that, but for the stay order, the decision of the case on the merits would have no effect on the litigants. Such is not the case here because there was no stay granted of the Missouri Commission's order challenged here.

Since a decision by the Supreme Court on the merits of this case will have no effect upon the litigants either prospectively or retroactively, the Supreme Court should dismiss the appeal.

II. Laclede's Appeal Does Not Present a Substantial Federal Question

Laclede argues that the challenged order renders nugatory Laclede's First Amendment right to advertise as incorporated by the Fourteenth Amendment (Jurisdictional Statement, pages 7-13). But the Commission's order did not ban Laclede's advertising; instead the order stated that Laclede ". . . is free to advertise as it sees fit." (Separate Appendix to Jurisdictional Statement, page A-71). The challenged order merely disallowed for ratemaking purposes certain of Laclede's advertising expenses which the Commission found did not benefit Laclede's ratepayers (Separate Appendix to Jurisdictional Statement, pages A-64 to A-73).

In its Report and Order of April 21, 1978, the Commission stated that the criteria which it had set out in *Re Kansas City Power & Light Company*, Mo.P.S.C. Case No. 18,433 *et al.* (1976) (unpublished) were the basis from which it would make its determination in respect to advertising. In Commission Case No. 18,433 *et al.*, the Commission held that it was appropriate for the company to be reimbursed by its ratepayers for conservation, safety, or off-peak load building advertising or for ". . . advertising designed to provide information of substantial benefit to the consumer in the use of the product or service sold, or in promoting customer-company relations" (Separate Appendix to Jurisdictional Statement, page A-65). The Commission did not deem goodwill advertising to be of this nature, but found it to be

". . . aimed at creating a favorable image of the Company or the Company's product in the public's view." (Separate Appendix to Jurisdictional Statement, page A-68).

Laclede apparently concedes that the challenged order did not directly ban advertising, but Laclede argues that the Commission's disallowance of certain advertising costs in setting Laclede's rates imposes an indirect economic penalty upon Laclede's exercise of its First Amendment rights (Jurisdictional Statement, pages 10-13). None of the four cases[1] relied upon by Laclede (Jurisdictional Statement, pages 10-13), to support its argument regarding indirect burden upon the exercise of its First Amendment rights, involved a regulated business in a monopoly position. These four cases are distinguishable because, as explained in the following three paragraphs, under Missouri law the Commission has authority to set rates for regulated companies such as Laclede. In setting rates the Commission protects a significant state interest, i.e. to maintain just and reasonable rates for Missouri ratepayers.

Laclede relies principally on *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 100 S.Ct. 2343, 48 U.S.L.W. 4783 (June 20, 1980) in contending that the Commission violated its First Amendment rights, but *Central Hudson* is easily distinguishable from the challenged order here. In *Central Hudson* the New York Public Service Commission had imposed a ban on promotional advertising by regulated electric utilities. That case did not address any issue respecting a state commission's disallowance of a utility company's good-

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[1] *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Talley* v. *California,* 362 U.S. 60 (1960); *Grosjean* v. *American Press Company, Inc.,* 297 U.S. 233 (1936); *Louisiana* v. *NAACP,* 366 U.S. 293 (1951).

will advertising expenditures as an operating expense for ratemaking purposes. The Missouri Commission merely disallowed for ratemaking purposes the cost of certain advertising which was found to be of no benefit to the ratepayers.

In *Central Hudson,* the Court held that promotional advertising is commercial speech, ". . . that is, expression related solely to the economic interests of the speaker and its audience [citations omitted]" 100 S.Ct. at 2349, 48 U.S.L.W. at 4784, and as such the Court applied a four part test to determine if the state action is in violation of First Amendment rights. First, there is no dispute here regarding whether Laclede's advertising is within the free speech provision of the First Amendment, and no allegation that Laclede's advertising was misleading. But Laclede fails to meet the remaining three criteria. The state interest of the Missouri Commission here is substantial, i.e. to maintain just and reasonable rates to consumers. (Separate Appendix to Jurisdictional Statement, page A-71). The Commission's order directly advanced the state's interest by not permitting Laclede to base its rates on advertising expenses that the Commission determined do not benefit the ratepayers. Lastly, the Commission's orders were not more extensive than necessary to further the state's interest of protecting the ratepayers.

The Commission is specifically authorized by statute[2] to examine the "methods, practices, regulations and property" employed in providing utility service and to consider "all facts which in its judgment have any bearing upon a proper determination of the question [of utility rates]." The Missouri Supreme Court has ruled

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[2] Rev. Stat. Mo. §§393.140(5) and 393.270(4) (1978).

that the Commission has authority to exclude certain items of expense in setting just and reasonable rates and a fair return. *State ex rel. Hotel Continental* v. *Burton*, 334 S.W.2d 75, 80 (Mo. 1960); *accord State ex rel. City of West Plains* v. *Public Service Commission*, 310 S.W.2d 925, 928-29 (Mo. banc 1958).

The Missouri Commission is not alone in its practice of excluding certain advertising expenses in ratemaking proceedings. Both the Ohio and Oklahoma Supreme Courts have held that institutional and promotional advertising expenditures may be disaliowed for ratemaking purposes unless the utility can establish that such expenditures benefit its ratepayers. *Cleveland* v. *Public Utilities Commission*, 63 Ohio St.2d 62, 406 N.E.2d 1370, 1379 (1980); *State* v. *Oklahoma Gas & Electric Company*, 536 P.2d 887, 897 (Okla. 1975).

The Missouri Commission's determination that Laclede's shareholders, rather than its ratepayers, must bear the expense of goodwill advertising is not calculated to limit the Company's exercise of its First Amendment rights. Indeed, in *Central Hudson* the Court specifically noted:

> There may be a greater incentive for a utility to advertise if it can use promotional expenses in determining its rate of return, rather than pass these costs on solely to shareholders. *That practice hardly distorts the economic decision whether to advertise* . . . (emphasis supplied) (100 S.C. at 2352, n. 11; 48 U.S.L.W. at 4786, n. 11)

Laclede relies in part on *West Ohio Gas Company* v. *Public Utilities Commission*, 294 U.S. 63 (1935) (Jurisdictional Statement, page 8, n.3) but the issue in that case was ". . . whether the rate of return has been further overestimated to the point of confiscation

through error and the rejection of charges upon income" (294 U.S. at 67). Laclede has not claimed here that the challenged orders of the Missouri Commission amount to confiscation of Laclede's property.

Laclede also contends that the disallowed expenses were for advertising primarily directed to informational and promotional ends, rather than being goodwill in nature (Jurisdictional Statement, pages 7-8). However, the Commission after a careful examination of the record found otherwise. The disallowed advertising expenditures were directed at the theme of conservation through efficient residential use of gas, were goodwill in nature, and of no direct benefit to the ratepayer. (Separate Appendix to Jurisdictional Statement, page A-70). Indeed, the Commission found that the advertising was ". . . nothing more than a thinly-veiled effort to keep the name of Laclede Gas Company before the public's eye and to promote the image of the company's product. To a lesser degree, such advertising promotes the sale of gas appliances (a nonregulated function that Laclede performs) and benefits that accrue from these sales will not accrue to the general ratepayers." (Separate Appendix to Jurisdictional Statement, page A-71).

Laclede argues (Jurisdictional Statement, pages 13-14) that the Commission's guidelines for distinguishing between recoverable and nonrecoverable advertising expenses are so vague as to threaten Laclede's right to advertise at all. However, a fair reading of the relevant portions of the Commission's order (Separate Appendix to Jurisdictional Statement, pages A-64 to A-73) indicates that the Commission specified in great detail the types of advertising which would be beneficial to ratepayers and which would be allowed for ratemaking purposes. The Commission's order (Separate Appendix to Jurisdictional Statement,

page A-65 to A-66) notes that these advertising guidelines were further defined in a prior order, *Re Kansas City Power & Light Company*, Mo.P.S.C. Case No. 18,433 *et al.*, (April 23, 1976) (unpublished). The challenged order gives fairly simple and understandable definitions of different types of advertising, and even goes so far as to give examples of certain types of advertising.

The Commission's old guidelines respecting advertising are somewhat similar to the advertising standard in the Public Utilities Regulatory Policy Act of 1978 (PURPA), P.L. 95-617, 16 U.S.C. §2601 *et seq.* Sections 303(b)(2) and 304(b) (15 U.S.C. §§3203(b)(2) and 3204(b)) of the Act state that no gas utility should recover the costs for either promotional or political advertising other than from the shareholders or other owners of the utility. Promotional advertising is defined in section 304(b)(C) as

> . . . any advertising for the purpose of encouraging any person to select or use the service or additional service of a gas utility or the selection or installation of any appliance or equipment designed to use such utility's service.

The states were directed to conduct a hearing to determine by November 9, 1980 whether to adopt this standard. In response to this directive the Commission caused to be published in the April 1, 1980 Missouri Register, 5 Mo. Reg. 358 (1980) a Notice of Proposed Rulemaking. There the Commission stated that it would consider adopting a rule that prohibits any gas utility from recovering from any person other than shareholders or other owners of such utility any direct or indirect costs of such utility for promotional, political, or goodwill advertising. The Commission held a hearing on July 23, 1980 concerning the proposed rule on advertising and caused to be published in the December 1,

1980 Missouri Register, 5 Mo. Reg. 1417 (1980) an Order of Rulemaking which withdrew the Commission's proposed rule on the grounds, among others, that the Commission's existing policy concerning advertising as established prior to and since the enactment of PURPA substantially conforms to the PURPA advertising standards.

For the reasons stated above there is no substantial Federal question presented by Laclede's appeal.

CONCLUSION

For the reasons stated above this appeal should be dismissed or the order of the Supreme Court of Missouri below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Motion to Dismiss or Affirm in accordance with Rule 33 of the Supreme Court of the United States.

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December 12, 1980